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No. 76-217

In the Supreme Court of the United States

OCTOBER TERM, 1976

ANDREW L. STONE AND M. JEANNE STONE, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioners seek review of the decision in this federal income tax case that their suit to enjoin the collection of a jeopardy assessment was barred by the Anti-Injunction Act, 26 U.S.C. 7421(a).

The pertinent facts are as follows: Pursuant to his authority under 26 U.S.C. 6861, on February 7, 1972, the Commissioner of Internal Revenue made a jeopardy assessment of income taxes against petitioners for the years 1963 through 1967 of $7,108,861.73 (Pet. 2-3; Pet. App. B 6a; JA 6, 18, 48).[1] On April 6, 1972, the Commissioner issued a statutory notice of deficiency, with an attached five-page computational schedule (Pet. 4; Pet. App. B 6a; JA 18, 48-53). Petitioners thereupon filed separate petitions in the

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[1] "JA" refers to the joint appendix filed in the court of appeals.

United States Tax Court for redeterminations of their tax liabilities. The Tax Court cases are still pending (Pet. 4; Pet. App. B 6a).

More than two years later, petitioners instituted this suit in the United States District Court for the Southern District of New York, seeking: (1) an injunction against the enforcement of the jeopardy assessment; (2) payment of interest income on assets placed in escrow; and (3) $10,000 in damages for alleged breach of an escrow agreement with the United States, which provided that the Civil Division of the Department of Justice would "use its best internal efforts to dissuade any other agency of the United States from proceeding by way of attachment or other lien against the property and assets of Stone" (Pet. 5; JA 11, 44). The principal allegation in petitioners' complaint was that the Commissioner's determination that the collection of the taxes was in jeopardy was made in bad faith to force petitioner Andrew L. Stone to settle other civil actions brought by the government and that the computations underlying the assessment were arbitrary and capricious (Pet. 4-5; Pet. App. B 6a-7a).

The district court dismissed the suit as barred by the Anti-Injunction Act, 26 U.S.C. 7421(a), which prohibits suits to enjoin the assessment and collection of any tax. The district court further held that there was a substantial basis for the jeopardy assessment, that the determination that jeopardy existed was made in good faith, and that the Commissioner's determination of jeopardy is not subject to judicial review (Pet. 6; Pet. App. B 9a-15a). The court of appeals affirmed by order (Pet. App. A 1a-2a).

1. Section 6861 of the Internal Revenue Code of 1954 empowers the Commissioner of Internal Revenue to take immediate steps to assess and collect a deficiency if he believes that the collection of the taxes will be jeopardized

by delay. *Transport Manufacturing & Equipment Co. of Del.* v. *Trainor*, 382 F. 2d 793, 799 (C.A. 8). The Commissioner's determination that collection will be jeopardized by delay is not subject to judicial review. *Transport Manufacturing & Equipment Co. of Del.* v. *Trainor, supra; Field* v. *United States*, 263 F. 2d 758 (C.A. 5), certiorari denied, 360 U.S. 918; *Lloyd* v. *Patterson*, 242 F. 2d 742 (C.A. 5). These decisions are in accord with the legislative history of Section 279(a) of the Revenue Act of 1926, 44 Stat. 59, the predecessor of Section 6861 of the Code. The pertinent Committee Report stated (S. Rep. No. 52, 69th Cong., 1st Sess. 27 (1926)): "It should be observed that the [Board of Tax Appeals] and the appellate courts have no authority to examine into the question as to whether the jeopardy determined by the commissioner in fact exists."

Petitioners contend (Pet. 6-9) that the decision below conflicts with *Laing* v. *United States*, 423 U.S. 161, and *Commissioner* v. *Shapiro*, No. 74-744, decided March 8, 1976. But neither *Laing* nor *Shapiro* held that a determination of jeopardy by the Commissioner of Internal Revenue was subject to judicial review. In *Laing*, the Court ruled that the Commissioner was required to issue a notice of deficiency in connection with his termination of a taxpayer's taxable year under Section 6851. *Shapiro* holds that where a taxpayer subject to a jeopardy assessment under Section 6861 shows irreparable injury and the basis of the assessment is not disclosed, the district court has jurisdiction to determine the applicability of the exception to the Anti-Injunction Act that exists where "under no circumstances" would the government prevail on the merits of its claim. See *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7.

Here, however, petitioners had received the deficiency notice within the time prescribed by Section 6861(b) (Pet. 4; Pet. App. B 6a), were fully apprised as to how the tax

was determined (Pet. 4; Pet. App. B 6a; JA 18, 48-53) and there had been a showing, through affidavit and exhibits, of the basis of the deficiency (Pet. App. B 9a-11a; JA 13-72). See *James* v. *United States*, 510 F. 2d 860 (C.A. 6), judgment vacated and remanded to the court of appeals for further consideration (No. 74-1420, March 22, 1976) in the light of *Commissioner* v. *Shapiro*, *supra*, original opinion affirmed, September 9, 1976, C.A. 6, No. 74-1867.

2. Petitioners further argue (Pet. 8) that the decision below conflicts with *Sherman* v. *Nash*, 488 F. 2d 1081 (C.A. 3). There, the court held that in a suit to enjoin collection of taxes, a district court is not barred by the Anti-Injunction Act from considering whether the only purpose of the jeopardy assessment was "to harass and coerce [the taxpayer] for improper purposes" (488 F. 2d at 1084). But the court in *Sherman* specifically stated that it fully concurred "with those courts which have concluded that Congress withheld jurisdiction from the district courts to review the sufficiency of the facts relied upon by the IRS to support a belief that jeopardy exists" (*ibid.*) and recognized that the existence of the required tax collection interest was sufficient to make the Anti-Injunction Act applicable. See *Iannelli* v. *Long*, 487 F. 2d 317 (C.A. 3), certiorari denied, 414 U.S. 1040.

At all events, the district court here specifically concluded (Pet. App. B 12a) that "it cannot be said that the assessment is wholly without foundation in fact." As the court further stated (*ibid.*): "To contend, under the facts here presented, that the District Director's concern for the collection of a potential deficiency of $7,000,000 was feigned borders on the fatuous." In so holding, the district court relied upon the government's affidavit (and exhibits attached thereto) which showed that petitioner Andrew L. Stone had pled guilty to using two corporations as vehicles for fraud and receipt of kickbacks (JA 15, 22-38) and

had diverted over four million dollars in illegally obtained payments into Swiss bank accounts in which he had an interest (JA 29-30). Under these circumstances, there is no basis to petitioners' claim that the tax assessment lacked an independent basis but was made solely to coerce them into settlement of their civil actions against the government.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1976.